U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 28 2009
LIN 07 145 50957

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The director treated the petitioner's untimely appeal as a motion, and affirmed the denial of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will sustain the appeal and approve the petition.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding the defined equivalent of an advanced degree. The petitioner, a maritime security systems design, compliance and training company, seeks to employ the beneficiary as its chief technical officer and vice president. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions with the equivalent of an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions with post-baccalaureate experience equivalent to an advanced degree as defined at 8 C.F.R. § 204.5(k)(2). The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the

Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on April 19, 2007. The petitioner's President, stated:

> [The petitioner] is offering [the beneficiary] employment as Vice President/Chief Technical Officer responsible for designing, managing and upgrading various[] proprietary security solutions for maritime operators to manage compliance

requirements. . . . This position demands [the beneficiary's] specific experience and expertise. . . . [The beneficiary's] implementation, support and enhancement of [the petitioner's] proprietary security solutions . . . for training security personnel will greatly improve the overall United States national security by insuring continued compliance of maritime operators and government agencies with national and international security laws, regulations and codes.

. . . [The petitioner] provides training and compliance management products and support to a broad array of private clients and government agencies within the maritime industry. . . .

[The petitioner] offers [the beneficiary] continuing employment as VP/Chief Technical Officer responsible for all aspects of design, implementation and management of our suite of proprietary, security compliance, training and information management software products in the area of maritime security. [The beneficiary] has played an essential role in the state-of-the-art computer and web-based technology widely used by governmental and private maritime operators in maintaining and upgrading their respective security postures.

In March of 2007, [the petitioner] embarked on a partnership with ADT/Tyco and Ciber Systems to develop integrated access control and tracking solutions for intermodal security. Central to this relationship is [the petitioner's] SVAM [Secure Vendor Access Module] 2.0 project which improves the existing visitor and logistics management application and integrates with ADT and Ciber hardware components. . . .

SVAM 2.0 is scheduled for release in the summer of 2007. . . .

[The beneficiary] is critical to this process and will be responsible for amending existing software to support the middleware requirements of the integration effort. . . .

Without [the beneficiary's] specific, security related technical knowledge and experience, rapid deployment of this upgrade would be impossible.

[redacted], the petitioner's Vice President of Operations, stated:

[The petitioner] is a small business that provides software and consulting services essential to the security of the maritime transportation system. We work with most of the major passenger vessel facilities throughout the country, the ships that call at these facilities, and the vendors that service them. [The petitioner] also works with major container terminal operators in the nation's largest commercial seaports, including Los Angeles/Long Beach, Oakland, and Seattle. . . .

> Four people make up [the petitioner]: three former U.S. Coast Guard officers (myself included), and [the beneficiary]. He provides all of the technical and software expertise that allows [the petitioner] to create tailor-made products to help our clients comply with the Maritime Transportation Security Act of 2002. These products include state-of-the-art access control software, a compliance management system that helps clients properly conduct risk and vulnerability assessments, and a series of computer-based training courses. In addition to having designed and produced all of these, [the beneficiary] also manages all technical support and maintenance, literally on a 24-hour basis.
>
> Over the years working with [the petitioner, the beneficiary] has developed a considerable amount of knowledge and expertise related to maritime security and the security regulations that govern the industry today. It is this knowledge, coupled with his considerable skill as an information technology (IT) professional, that make him even more unique and absolutely indispensable to the company.

The petition included several witness letters, some of them dating back to 2003-04 (having been prepared for an earlier nonimmigrant petition). One of these older letters was from [redacted] Director of Business Development for Homeland Security Corporation, who stated:

> [The beneficiary] and I first worked together on the TSA [Transportation Security Administration] Passenger Screener Training (PST) contract at the Federal Aviation Administration (FAA) Mike Monroney Aeronautical Center in Oklahoma City, OK. [The beneficiary] . . . helped configure thousands of computers used to train passenger screener students. The Smart Approach software was indispensable to our training mission. . . .
>
> Training continued after the initial one year period and [the beneficiary] continued to support the mission, configuring computers, setting up wide and local area networks, and trouble shooting when problems arose at training sites across the United States and Territories.

In a 2003 letter, Chief Executive Officer of International Logistics Solutions, LLC, stated:

> [The beneficiary] is a prominent figure in the information technology industry. His acumen as IT Director for Smart Approach Limited has permitted the company to reach new heights. . . .
>
> My association with Smart Approach Limited and [the beneficiary] was through the Passenger Screener Training Program as a result of the 9/11 terrorist attack at the World Trade Center Towers. I was a subcontractor with the Lockheed Martin team that was awarded the contract to accomplish the training requirements for the Passenger Screener

Training Program. Smart Approach, and more specifically [the beneficiary, were] . . . instrumental in the on-time completion of that contract.

In a more recent letter, of Security Operations and Intelligence for Princess Cruises, stated:

[The petitioner] has been indispensable to Princess Cruises' security operations. The one-of-a-kind internet-based SVAM system which [the beneficiary] developed and supports has not only been critical to modernizing and improving our business methodology, but also to providing a critical layer of security and compliance, by allowing us to more closely track deliveries and visitors to fleet vessels.

[The petitioner] and [the beneficiary] have also provided invaluable service to our onboard security staff by providing essential, industry-focused onboard computer-based courses and x-ray simulation training. [The petitioner's] complementary web-based reporting system provides a simple method for tracking progress, certification and compliance for over 500 security personnel.

In short, we at Princess Cruises consider [the beneficiary's] contribution to the safe and secure operation of our fleet to be invaluable.

[redacted] of Global Security Initiatives at CIBER, Inc., stated:

My company, CIBER, Inc., is an international systems integration consultancy that works with private and government sector clients. One of our areas of expertise is port security. . . .

CIBER has teamed with [the petitioner] to integrate our current products and design cutting edge systems that will result in significant improvements to overall maritime security. [The beneficiary's] comprehensive knowledge and information technology skills are critical to developing these solutions, which provide secure, synchronized command and control, surveillance, and port security data.

[redacted], Transportation Manager for ADT Security Services Inc., stated:

I am working with [the beneficiary and the petitioner] to integrate our respective products so that they can be used to improve security in the maritime port environment. We are working together to create a system that will use hardware and software to improve access control, physical security, surveillance and monitoring at port facilities and on board ships. . . .

[The beneficiary] plays a critical role in developing these systems and products. It is my understanding that [the beneficiary] is solely responsible for designing and creating the

> software that allows the different products to communicate with each other and then produce the output for the people operating the equipment.

On March 27, 2008, the director instructed the petitioner to "establish . . . the beneficiary's ability to serve the national interest to a substantially greater extent than the majority of his colleagues" and "demonstrate . . . the beneficiary's influence on his field of employment as a whole."

In response, counsel stated:

> [The beneficiary] has been a driving force behind several information technology and security initiatives that are critical towards ensuring the safety of the maritime transportation sector. For example, [the beneficiary] is responsible for the fact that [the petitioner's] clients (vessels and facilities alike) are fully compliant with all aspects of the domestic and international security regulations pertaining to maritime security. [The petitioner's] Secure Vendor Access Module (SVAM), which [the beneficiary] conceived, developed and now maintains and supports, is used by thousands of people worldwide to fully meet many of the most challenging requirements under international security regulations. . . . Evidence of [the beneficiary's] unique talent in this highly specialized area is in the growing number of vessel and facility operators adopting and using the SVAM system he created.

[redacted] stated:

> [The petitioner] decided to replace the existing Smart Approach Maritime Screener Course (MSC) with our own product that would incorporate many of [the beneficiary's] new ideas for delivering advanced x-ray simulation and training. . . . The resulting product – the Phoenix Training System – became the base operating platform for all [the petitioner's] training courses.
>
> . . . Currently, our Maritime Screener Course is deployed on more than 50 percent of the world's major passenger vessels and serves as the primary training tool for their security personnel. With [the petitioner's] continued involvement, we expect this figure to approach 90 percent by the end of this year.

The petitioner submitted documentation showing that major cruise lines and maritime security providers have licensed the petitioner's training materials.

The director denied the petition on August 22, 2008, stating that the petitioner had established the intrinsic merit and national scope of the beneficiary's maritime security work, but had not sufficiently documented its claims regarding the beneficiary's standing in his occupation. The director acknowledged the petitioner's claims about the widespread use of materials developed by the beneficiary, but found that the petitioner had not produced evidence to support those claims. The director also noted that the petitioner's success as of mid-2008 cannot retroactively establish that the

beneficiary was already eligible for the waiver as of the April 2007 filing date, because 8 C.F.R. § 103.2(b)(1) requires that the evidence must show the petition to be approvable as of the filing date. The director found that the letters from clients and colleagues failed to provide a meaningful comparison between the beneficiary and others in his field.

The petitioner filed an untimely appeal, which the director treated as a motion pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(*2*). Counsel argued: "the government fails to understand or recognize the unique nature and scope of the Beneficiary's particular, specialized occupational field," which makes "the 'typical' forms of evidence . . . unavailable."

The petitioner submitted further witness letters. [redacted] of the United States Coast Guard, who "served with all three of the [petitioner's] founding partners while on active duty with the U.S. Coast Guard," called the beneficiary "a pioneer in his field" but said little else about the beneficiary apart from a brief description of his duties.

Senior Developer at the beneficiary's former employer Smart Approach Ltd., stated:

> [The beneficiary] invented the x-ray image capture process that transformed the quality of images from crude, at best, to nearly perfect. As a result, the entire x-ray simulation field has been dramatically improved and students are provided with the most realistic training possible in a non-threat environment.
>
> . . . Essentially, [the beneficiary] led the effort to provide x-ray simulation training for all airport screeners in the United States.
>
> . . . [The beneficiary] is clearly a leader who has influenced the field of x-ray simulation and training.

[redacted], former Assistant Secretary for Strategic Plans and former Acting Under Secretary for the Border and Transportation Security Directorate of the Department of Homeland Security, stated:

> [T]here are few companies in this field that have long term domain experience and even fewer key employees of these companies that have both expertise and domain experience using that expertise. [The beneficiary] is one of these people. . . . He is a rare asset and his continued work in this area is clearly in the national interest.
>
> Few, if any other companies have made such important contributions to the readiness of security personnel and to providing industry-specific solutions and systems that enhance the delivery of security on a daily basis.
>
> As the IT Director and the only information technology person on the [petitioner's] team, [the beneficiary] has designed and developed these integrated applications as ground-breaking technologies that will have wide reaching impact for maritime and

> intermodal security. What makes [the beneficiary] unique, and his contributions so important, is that not only does he have exceptional skills, but more importantly he has the specific experience to understand the industry and the specific security problems the industry faces. It is fair to say that since no other company is engaged in providing these industry-specific training, access and compliance management products for the cruise market, that [the beneficiary] is a key if not the pre-eminent figure in the field.

The director again denied the petition on January 23, 2009. The director discussed counsel's brief and the witness letters, but concluded that the letters were "from former and fellow colleagues and coworkers," and lack "corroboration from disinterested parties." The director further observed that "identifying the [beneficiary's] projects and accomplishments does not establish that those achievements are inherently superior to those of others in the same occupation."

On appeal from the director's decision, counsel argues that the previously submitted letters and evidence show unique circumstances that the director failed to take into account. Counsel asserts that "the totality of the particular evidence" demonstrates the beneficiary's eligibility for the waiver.

While many of the witnesses have worked directly with the beneficiary or with the petitioner's principals, we must consider the circumstances of these interactions. The beneficiary is not a scientific researcher who publishes his work in journals, where it influences the later work of independent researchers. Rather, the beneficiary works for a private enterprise, working for specific clients. The record shows widespread use of the petitioner's materials, and the petitioner has credibly attested that the beneficiary is the one who created and developed those materials. We give due weight to the uncontradicted assertions of a former top official of the Department of Homeland Security, who had jurisdiction over transportation security during his tenure there.

It is true that a number of exhibits in the record date from after the filing date. Those exhibits, however, do not represent a significant change in the beneficiary's duties, nor do they concern the beneficiary's accomplishments after the filing date. Rather, the materials deal with the ongoing licensing of software and training materials that the beneficiary had already developed at the petitioning company.

While some of the petitioner's arguments are more persuasive than others, and some of the petitioner's specific claims of fact remain unproven, on balance the petitioner has established that the beneficiary has been, and remains, an important innovator in his field. After careful review of the available evidence, we find that the petitioner has established that the beneficiary is eligible for the waiver.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained. The petition is approved.